A **AHMAD FAHRUL RAZY ABDULLAH**

v.

PP & ANOTHER APPEAL

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
YEW JEN KIE JC
[CRIMINAL CASE NOS: K42-28-04 & K42-28(A)-04]
17 SEPTEMBER 2008

C ***CRIMINAL LAW:*** *Anti Corruption Act 1997 - Section 10(a)(bb), 11(a) - Soliciting and accepting RM1,000 by policeman as inducement for releasing detainee from police lock-up - Whether prima facie case established - Whether sufficient corroborative evidence available - Whether statutory presumption under s. 42(1) Anti Corruption Act 1997 properly*
D *invoked*

CRIMINAL LAW: *Anti Corruption Act 1997 - Soliciting for gratification - Presumption under s. 42(a) ACA 1997 - Legal burden of proof on accused to rebut presumption on balance of probabilities - Whether*
E *burden heavier than casting reasonable doubt*

CRIMINAL PROCEDURE: *Appeal - Facts, finding of - Finding of facts based on assessment of demeanour - Trial judge's findings of facts made after a proper evaluation of evidence - Whether appellate interference warranted*

F

CRIMINAL PROCEDURE: *Sentencing - Corruption - Policeman convicted of corruption - Public interest factor in sentencing - Whether abuse of position by policeman an aggravating factor - Whether numerous adjournments of hearing through no fault of accused a mitigating factor*

G

EVIDENCE: *Appeal - Interfering with findings of facts - Credibility of witnesses - Demeanour - Assessment and findings of trial judge - Whether unsupported by or against weight of evidence - Whether appellate court should interfere with trial judge's findings on credibility*

H ***EVIDENCE:*** *Witness - Reliable witness - Whether prosecution witness a reliable witness - Assessment of demeanour before trial court - Whether supported by evidence - Whether appellate interference required*

The accused, a police corporal, was found guilty by the learned trial
I judge on two counts, namely: (i) under s. 10(a)(bb) of the Anti Corruption Act 1997 ("the Act") for having corruptly solicit

gratification of RM1,000 from one Nawiri bin Lop, as an inducement to release a detainee named Wahyu bin Azis; and (ii) under s. 11(a) of the Act for having corruptly accepting a gratification of RM500 from Nawiri bin Lop as an inducement to release one Wahyu Azis from the police lock-up. Following the conviction, the accused was sentenced to one month imprisonment for each charge, to run concurrently. The accused appealed against the conviction and the sentence and the prosecution appealed against the inadequacy of sentence. Basically the accused denied that he had demanded RM1,000 from PW3 or received RM500 from PW5. He alleged that PW8 (a decoy from the Anti Corruption Agency) had set him up by putting the money on his table when he went out to answer the phone call. The accused further argued that the learned trial judge had erred in not taking into account the evidence of DW2 (a policeman). The prosecution contended that the learned trial judge had erred by not following the provision under s. 16 of the Act which provides for punishment in imprisonment and fine.

Held (dismissing the accused's appeal against conviction and sentence):

(1) The learned trial judge, after satisfying himself that prosecution had proven the element of solicitation and acceptance of gratification (the element that the accused was a public servant was not in dispute), had properly invoked the legal presumption provided under s. 42(1) of the Act. (para 11)

(2) The learned trial judge arrived at the finding that the prosecution had made out a *prima facie* case by relying on his assessment of the credibility and reliability of witnesses. The appellate court would be slow to interfere with the finding of facts based on the observation of witnesses in court. The finding of facts based on assessment of demeanour, however, must be substantiated by the evidence in order for the appellant court to agree with the findings. Demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. The *prima facie* finding by the learned trial judge was supported by the evidence presented by the prosecution. (paras 12, 13 & 15)

(3) There was nothing in the evidence of DW2 that would lend support to the accused's defence. The learned trial judge had rightly come to the finding that the prosecution had proved its case beyond reasonable doubt. (paras 29 & 34)

(4) However, the learned trial judge, after finding that the accused had failed to discharge the legal presumption on the balance of probability, went on to say that the accused has also failed to cast a reasonable doubt on the case of the prosecution. It was a superfluous exercise in view that the legal burden of proof had shifted to the accused by operation of the legal presumption under s. 42(a) of the Act. Where legal presumption arises, the burden is on the defence to rebut it and the standard of proof required of the accused is on the balance of probabilities, which is heavier than casting a reasonable doubt. Therefore, once the learned trial judge had satisfied himself that the accused had failed to rebut the legal presumption on the balance of probability, the verdict that must be entered was that the prosecution had proved the two charges preferred against the accused beyond reasonable doubt and the accused be accordingly convicted of the charges preferred against him. (paras 35, 36, 37, 39 & 40)

(5) The learned trial judge had failed to take into account public interest when sentencing. Although the accused had been greatly inconvenienced by the numerous adjournments of hearing through no fault on his part, the factor could never outweigh the interest of the public especially when the offence committed was that of corruption by a policeman. It is a serious matter when policemen abuse their positions and prey on helpless and vulnerable public. (para 47)

(6) The sentence of one month imprisonment without fine was unjustifiably lenient and was therefore substituted with a fine of RM10,000 in default three months imprisonment and an imprisonment term of six months on each count, to run concurrently. (para 49)

Case(s) referred to:

Attan Abdul Gani v. PP [1969] 1 LNS 12 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***

Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Nagappan Kuppusamy v. PP [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 SC ***(refd)***

PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(refd)***

PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***

Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***

Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 10(a)(bb), 11(a), 16, 42(1)
Prevention of Corruption Act 1961, ss. 14, 42(1)

For the appellant - In person
For the respondent - Nazlyza Mohamad Nazri DPP

Reported by Amutha Suppayah

JUDGMENT

Yew Jen Kie JC:

[1] This is the hearing of two appeals. To avoid confusion I shall refer to the parties as they were in the lower court.

[2] The first appeal is by the accused who had been found guilty by the learned trial judge, after a full trial, on two counts, namely;

I. Under s. 10(a)(bb) of the Anti Corruption Act 1997 ("the Act"), in that, he being an agent of the Government of Malaysia, to wit, a corporal, did corruptly solicit gratification of RM1,000 from one Nawiri bin Lop, as an inducement to release a detainee named Wahyu bin Azis.

II. Under 11(a) of the Act, in that, he being an agent of the Government of Malaysia, to wit, a corporal, did corruptly accept for himself a gratification of RM500 from Nawiri bin Lop as an inducement to release one Wahyu Azis from the police lock-up.

Following the conviction, the accused was sentenced to one month imprisonment for each charge. Both sentences to run concurrently. The accused now appeals against the conviction and the sentence.

[3] The second appeal is by the deputy public prosecutor against the inadequacy of sentence.

[4] I do not propose to set out the case of the prosecution and the defence for reasons that they were set out in details in the judgment of the learned trial judge. Reference will be made later in the course of this decision.

Appeal Against Conviction

Issues

[5] Seven grounds were enumerated in the Petition of Appeal which essentially revolve around the following complaints:

a. That the learned trial judge had erred in law and in fact in holding that the prosecution had established a *prima facie* case at the end of the prosecution case.

b. That the learned trial judge had erred in law and in fact in failing to consider the appellant's sworn testimony.

c. That the learned trial judge had erred in law and in fact in disbelieving and not accepting and in failing to consider the testimony of DW2.

d. That the learned trial judge had erred in law and in fact in holding that the prosecution had proved the offences beyond reasonable doubt.

Whether Prosecution Had Established A Prima Facie Case At The Conclusion Of The Case For The Prosecution

[6] The accused submitted that it was not PW3 but PW8 who passed him the sum of RM500. He did not take the money when PW8, a decoy from the Anti Corruption Agency, passed him the money. Instead he scolded him and said that he did not like to take bribe and that he was once commended by the Commissioner of Police for arresting a public member for bribery. However, PW8 did not pay heed to what he said and had intentionally placed the money on his table while he went out to answer the phone.

[7] Having perused the judgment of the learned trial judge, I do not agree that the learned trial judge had erred in holding that the prosecution has made out a *prima facie* on the two counts. The relevant passage in the judgment is reproduced as follows:

> a. Crucial evidenced came from the other occupant of the lorry detained during the operation. He is Nawiri bin Lop (SP3). At the material time he was in the business of trading horses and buffaloes. Wahyu bin Azis, an Indonesian national is his relative. He testified that at about 12.00 midnight on 14.3.1998 while on his way to Kota Belud together with Wahyu his lorry was stopped by the police at the Poring junction. Upon inspection Wahyu's passport was found to have

expired. What transpired there after was that the accused asked SP3 if he was prepared to "jamin" Wahyu. SP3 asked the accused what was the term of the "jamin" whereupon the accused asked SP3 if RM1,500.00 was alright. SP3 said he had no money. The accused then reduced the amount to RM1,000.00. Still SP3 told the accused he had no money. The accused then told SP3 "Last runding lima ratus ringgit". SP3 again told the accused that he had no money and at the same time showed the accused a RM2.00 note. The accused took the note and passed it back to SP3 and asked him to keep it. The accused then told SP3 that he was arresting Wahyu. Wahyu was then brought to the Ranau police station where he was kept in the lock up.

b. That morning SP3 decided to return to Sandakan to inform Wahyu's family of his arrest. As Wahyu's son was not there SP3 then returned to Ranau and went to see Wahyu's auntie at Kundasang. Her name is Ida (Jahida Bte Amir - SP7) The following morning SP3 and SP7 went to Ranau police station to visit Wahyu. At the station the accused asked SP3 how much he was prepared to pay if the case was still under his authority. He asked SP3 if he was prepared to pay RM1,500.00 or RM1,000.00. SP3 then told the accused not to be like that ("Jangan begitu boss") as Wahyu was not from a rich family. The accused's response was "Jadi kau sanggup berapa saja?" to which SP3 said "kalau setakat RM400.00 atau RM500.00 itu pun saya kena runding dengan keluarga dia". The accused then asked where was Wahyu's family. Thereupon SP3 called SP7 to come in to the accused's room. SP7 could only speak in Bugis. Through the interpretation of SP3, SP7 told the accused that RM1,000.00 was a bit hard on her but if it was RM400.00 or RM500.00 maybe she could afford it. The accused appeared to be unhappy on hearing that but went to ask SP3 "macam mana itu duit?" SP3 told him he did not have the money with him. The accused asked SP3 when he could hand over the money to which SP3 said maybe in the afternoon or the following day. SP3 and SP7 then returned to Kundasang. SP3's testimony with regard to the demand for money is corroborated in material particulars by SP7.

c. Having thought the matter over, SP3 decided to report the demand to the Anti Corruption Agency. A trap was then set up by the Agency using officer Zulkifli bin Abdul Hamid (SP8) as a decoy. SP8's role was to act as Wahyu's cousin. Thus on 17.3.1998 at around 3.00 p.m. SP8 together with

SP3 went to the Ranau police station to trap the accused. According to SP8 after being called into the Accused's room, the accused did say to him "bukan kita offer sama dia orang, dia orang offer sama kita. Dia orang minta tolong, kita tolonglah". The accused went on to say that the money was meant for the office. SP8 then asked the accused how much he was asking. The accused said RM500.00. SP8 then proceeded to pass the RM500.00 to the accused but the accused did not take it. He asked SP8 to leave it on the table. The conversation was tape recorded. After SP8 put the money on the table, someone opened the door and informed the accused that there was a phone call for him. The accused and SP8 then went out of the room and SP8 proceeded to get out of the police station together with SP3 and Wahyu while the accused answered the telephone at the counter.

d. What happened after that is explained by ACA officer Muhamad Noor bin Ismail (SP13). Having seen the prearranged signal that the trap money had been handed over to the accused, SP13 straight away proceeded to the accused's room but the accused was nowhere to be seen in the room. He later came to know that the accused was in the OCPD's room. So he proceeded to the OCPD's room and true enough the accused was in the room. He instructed his officer to detain and body check the accused but no money was found on him. The accused's room was also searched but the trap money was also not there. So the officer decided to conduct a search in the OCPD's room. As a result RM150.00 of the trap money was handed over by the OCPD, ASP Adni bin Abu Bakar (SP5) to the ACA officers while the balance of RM350.00 was retrieved from the file rack behind SP5's chair on information given by the accused to SP13.

e. SP5 on his part testified that at the material time he was the Ranau District police chief. He confirmed that Wahyu was released on his instruction on humanitarian grounds as the period of overstaying was only two days. He confirmed that the RM150.00 trap money was handed over to him by the accused. This took place in his room. According to him the accused told him that the money was a donation. SP5 further testified that after giving him the RM150.00 the accused proceeded to the area behind his chair where the file rack was located. SP5 said he did not see what the accused was doing there but confirmed that it was the accused who pointed to the ACA officer the place where the RM350.00 was hidden.

[8] It can be seen in the above judgment that the learned trial judge had evaluated and assessed the testimonies of the key witnesses, namely, PW3, PW8, PW13, PW5 whom he accepted as witnesses of truth.

[9] Learned trial judge had also addressed his mind to the issue whether PW3 was an accomplice and concluded that he was not. In any event he found that PW3's testimony on solicitation by the accused was substantially corroborated by PW7. After making the finding that PW3 was not an accomplice and acting on the evidence of PW3, PW8, PW5 and PW15, learned trial judge went to say that "I find it safe to accept the prosecution's case that the accused did as a matter of fact solicit the RM1,000 from SP3 as alleged in the first charge. I also find it safe to accept the prosecution's case that the accused did as a matter of fact obtain the RM500 from SP3 as alleged in the second charge."

[10] In *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ at p. 90, the Privy Council held:

> Where a defendant is charged with an offence under s. 4 of PCA to which s. 14 also applies, the onus lies upon the prosecution to prove the first two factual ingredients of the offence *viz* that the prosecution gratification was paid or given to or received by the defendant and that at the time of the payment he was in employment of a public body. Upon proof of these two ingredients the existence of the third ingredient that gratification was paid or given or received corruptly as an inducement or reward to do an act in relation to the affairs of the public body is to be presumed unless the contrary is proved.

[11] In my opinion, the learned trial judge, after satisfying himself that prosecution had proven the element of solicitation and acceptance of gratification (the element that the accused was a public servant was not in dispute), had properly invoked the legal presumption provided under s. 42(1) of the Act (equivalent to s. 14 of the Prevention of Corruption Act 1961) and said: "Such being the case the money is deemed to have been corruptly solicited and obtained by the accused unless he proves otherwise."

[12] The judgment shows that the learned trial judge arrived at the finding that the prosecution had made out a *prima facie* case by relying on his assessment of the credibility and reliability of witnesses.

[13] It is fairly established law that the appellant court will be slow to interfere with the finding of fact which is based on the observation of witnesses in court. This is because trial judge has the advantage of hearing the witnesses and has the opportunity of obtaining an impression of the truthfulness from the witness's demeanour as well as drawing inference from proven facts which in turn dependent on credibility and demeanour of the witnesses. (see *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197).

[14] The finding of fact based on assessment of demeanour, however, must be substantiated by the evidence in order for the appellant court to agree with the findings. This is made very clear in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457 where the Federal Court held: "Unless it can be shown that the finding of facts are not supported by the evidence or it is against the weight of the evidence or that it is a perverse finding it is not for us to disagree. Further, we should be slow to disturb the learned judge's assessment and finding on the demeanour of the witnesses. This is for the simple reason that he is the best person to observe the demeanour. We are handicapped as we have to go by the cold print of their evidence in the notes of proceedings." Demeanour of course is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility (*Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176).

[15] Bearing in mind what has been said in the above authorities, I ask myself whether the *prima facie* finding by the learned trial judge is supported by the evidence presented by the prosecution. After a careful examination of the testimonies of PW3, PW8, PW7, PW5 and PW13, I reach the conclusion that there is no reason for me to disagree with the finding of the learned trial judge in this respect.

[16] PW3's evidence that the accused had solicited RM1,000 was corroborated by PW7, the aunt of Wahyu who went to the police station together with PW3. I am mindful that there is a discrepancy in the testimony between PW3 and PW7 in that according to PW3, PW7 was in the room when the accused demanded RM1,000 whereas PW7 testified that she did not enter the room with PW3. This is in my view a minor discrepancy which does not discredit PW3 as to render his evidence on this respect to be unreliable. I say so because the accused not only had not challenged PW3 on

his evidence that PW7 was in the room, the defence in fact put to the PW3 that "semasa awak dan perempuan itu di pejabat saya, ada tidak awak rundingkan pembebasan Wahyu?"

[17] A further perusal of the evidence shows that the accused also had not challenged the evidence of PW5 that when the accused came to see him with the money, he told PW5 that the money was a donation and that the accused walked to the area behind his chair prior to the ACA officers entered the room and subsequently a sum of RM350 was retrieved from the file rack behind his chair after the accused pointed out the place to the ACA officer.

[18] The evidence further shows that the accused did not challenge PW8's evidence that the accused said "Ampai" when he took the money out.

[19] In my opinion, although it was PW8 who passed the sum of RM500 to the accused, the fact remains that the accused had accepted the bribe from PW3. PW8 was merely a conduit in passing the money that the accused had demanded from PW3.

[20] A perusal of the record shows that there is ample credible evidence being adduced by the prosecution upon which the learned trial judge had correctly made a finding of a *prima facie* case. I find no merit in the complaint that the learned trial judge had erred in holding that the prosecution had established a *prima facie* case.

Whether Learned Trial Judge Had Failed To Consider The Appellant's Sworn Testimony

[21] The appellant next complained that the learned trial judge had failed to consider adequately the fact that the appellant had told the court that he had asked PW8 to take back the money but PW8 intentionally placed the money on the appellant's table when the appellant left his room to attend to a phone call at the counter. Basically the accused denied that he had demanded RM1,000 from PW3 or received RM500 from PW5. He alleged that PW8 had set him up by putting the money on his table when he went out to answer the phone call.

[22] In his judgment the learned trial judge assessed the appellant's defence and said as follows:

> i. On being asked to state his defence the accused chose to give evidence under oath. His defence in respect of the first charge is nothing more than a bare denial while in respect of the

second charge his defence is less straightforward. In respect of the second charge his assertion is that after telling SP8 that Wahyu was arrested because his passport had expired SP8 took out the RM500.00 from his pocket and placed them on the table. He asked SP8 what the money was for but SP8 kept quiet. He then scolded SP8 for doing what he did and went on to tell SP8 that he once arrested a Chinese who tried to bribe the police. He boasted that he was commended by the Police Commissioner for his honesty in that case.

ii. The accused went on to testify that he asked SP8 to take back the money but SP8 did not take heed and that not long after that someone knocked the door and informed him that there was a phone call for him. He said he then went out and would not know if SP8 had taken back the money. When he returned to his room he said the money was still on the table. He claimed that he did not know what to do with the money so he went to see SP5 to seek instruction. However before they could discuss suddenly the ACA officers knocked the door and entered the OCPD's room. He said he was body checked, after which he was instructed by an ACA officer to point to the direction behind SP3's chair where the trap money was subsequently found. In cross examination he said he is not sure how the money came to be there but suggested that may be the ACA officers planted the money there.

[23] After evaluating and assessing the evidence of the accused, the learned trial judge made the following findings:

i. I have carefully considered the accused's defence in respect of each of the charges and I find that he has totally failed to prove, on the balance of probabilities that the RM1,000.00 was not a corruptly solicited and the RM500.00 not corruptly obtained. Having regard to the conduct of the accused at the time the RM1,000.00 was demanded and at the time the RM500.00 was obtained, it is not probable that the demand and acceptance were not actuated by a corrupt motive. In any event it is not the defence case that the accused was not motivated by a corrupt mind when he asked for RM1,000.00 and when he obtained RM500.00. As mentioned earlier his defence in respect of the first charge is nothing more than a bare denial while his defence in respect of the second charge is neither here nor there. A bare denial is certainly insufficient to discharge the burden of proof under section 42(1) of the PCA.

ii. The accused said he scolded SP8 for giving him the RM500.00, even threatening SP8 in a veiled way that he could be arrested for bribing him. Yet he took the money anyway, as if expecting it. This act is wholly inconsistent with the behaviour of a conscientious and honest policeman he tried to make himself out to be. While admitting that he took the RM500.00 left behind by SP8, he does not say what the money was for except to say that SP8 did not tell him the money was for the release of Wahyu. What is undisputed however is the fact that after taking the money and shortly before the ACA officers entered the OCPD's room it was hidden in the file rack. Having regard to the surrounding circumstances I have no doubt that it was the accused who hid the RM350.00 and gave the other RM150.00 to SP5. On being recalled by the defence SP5 testified that the accused closed the door to his office when it was knocked by the ACA officers. These acts clearly show that the accused had a guilty mind when he took the RM500.00 left behind by SP8. His suggestion that the money was planted by the Anti Corruption Agency in the OCPD's room is absurd to say the least.

[24] Having carefully perused the above judgment of the learned trial judge, I do not agree with the accused that the learned trial judge had failed to consider his sworn evidence. The above judgment shows that the learned trial judge had assessed and evaluated in detail the evidence of the appellant against the evidence of PW5 and arrived at a finding that the accused not only had failed to rebut the presumption under s. 42 of the Act, he also had found that PW5's evidence of the accused closing the door of PW5's office when it was knocked by the ACA officers goes to prove that the accused had a guilty mind when he took the sum of RM500 left on the table by PW8. Accordingly, for the reasons aforesaid, I find no merit in the complaint that the learned trial judge had erred in failing to consider the accused's testimony.

Whether Learned Trial Judge Erred In Disbelieving And Not Accepting The Evidence Of DW2

[25] The accused further argued that the learned trial judge had erred in law and in fact in not taking into account the evidence of DW2 who is a reliable witness.

[26] In his judgment, learned trial judge said thus in respect of DW2's evidence: "The defence called on other witness, namely Zainuddin bin Abd Zamlee (DW2). This witness has said nothing

to support the defence case. I therefore do not consider his evidence to be of any value in determining whether the accused has successfully in disproving corrupt motive in respect of both charges."

[27] DW2 is a policeman. He was a member of the police party that conducted the road block on 14 March, 1998. He claimed that after the police had arrested Wahyu, he did not see the accused, who was in the same group as he talked to PW3. He subsequently accompanied Wahyu back to the police station and surrendered him to another police personnel to be placed in the lock up. He did not see Wahyu again after that.

[28] He further testified that he was on duty at the counter at the police station the next day while the accused was working in his room. He could not see the accused's room from the counter. He could not remember whether anyone by the name of Zulkefli had met him at the counter. He added that he had never met Zulkefli.

[29] I fully agree with the learned trial judge that there was nothing in the evidence of DW2 that would lend support to the accused's defence. In any event, by the accused's own admission, he had met and talked to PW3 on the night when Wahyu was arrested as well as the next day except that he denied he had demanded for gratification from PW3 for the release of Wahyu. Accordingly, I find no merit in the complaint that the learned trial judge had erred in failing to consider the evidence of DW2.

Whether The Prosecution Had Proved Its Case Beyond Reasonable Doubt

[30] As the conclusion of the judgment, learned trial judge held thus: "In the circumstance the only verdict I can arrive at in respect of each charge is a verdict of guilty. I am not only satisfied that the accused failed to disprove the presumption of corrupt motive under s. 42(1) of the Act but I am also satisfied that the accused failed to raise any reasonable doubt in my mind as to his guilt. I am satisfied that the prosecution has proved both charges beyond reasonable doubt".

[31] The accused submitted that the learned trial judge had erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt because the prosecution had not adduced sufficient evidence and relied only on circumstantial evidence.

[32] With respect, I do not agree. I have earlier on given my reasons why I agreed with the learned trial judge's finding that the prosecution had made out a *prima facie* case.

[33] I have also given my reasons in above why I agreed with the learned trial judge who found that the accused had failed to rebut the presumption raised against him on the balance of probability.

[34] In my judgment, the learned trial judge had rightly come to the finding that the prosecution's had proved its case beyond reasonable doubt.

[35] However, I observe that the Learned trial judge, after finding that the accused had failed to discharge the legal presumption on the balance of probability, went on to say that the accused has also failed to cast a reasonable doubt on the case of the prosecution.

[36] In my opinion, it is a superfluous exercise in view that the legal burden of proof has shifted to the accused by operation of the legal presumption under s. 42(a) of the Act.

[37] Section 42 of the Act provides, amongst others, that in any proceedings against any person for an offence under s. 10 and 11 the gratification shall be presumed to be corruptly accepted or solicited if it is proved that any gratification has been accepted or solicited, unless the contrary is proved.

[38] In *Nagappan Kuppusamy v. PP* [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 (SC), Hashim Yeop A Sani SCJ said, at p. 231:

> Where the burden is shifted to the defence by a statutory presumption, the test in *R v. Carr v. Brian* [1943] KB 607 and adopted in *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 should be applied as applied in civil proceedings, namely, on the balance of probabilities.

[See also *Attan Abdul Gani v. PP* [1969] 1 LNS 12, *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150. *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162]

[39] In *Yuvaraj*'s case, *supra*, the Privy Council held:

> The burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable is understood as meaning the burden of rebutting such presumption is discharged if the Court considers on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward ... .

[40] In *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, the Supreme Court held:

> It is a well-established principle of Malaysia criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charge. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed in the general burden, shifts to the defence to rebut such presumption on balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under section 173(f) or s. 180 of the Criminal Procedure Code, the Court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v. PP*). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

Following from what has been said in the above authorities, it is clear that where legal presumption arises, the burden is on the defence to rebut it and the standard of proof required of the accused is on the balance of probabilities, which is heavier than casting a reasonable doubt.

[41] Therefore, once the learned trial judge has satisfied himself that the accused had failed to rebut the legal presumption on the balance of probability, the verdict that must be entered is that the prosecution has proved the two charges preferred against the accused beyond reasonable doubt and the accused be accordingly convicted of the charges preferred against him.

[42] For all the reason aforesaid, I dismiss the appeal against conviction.

Appeal Against Sentence

[43] Both the prosecution and the accused appealed against the sentence imposed.

[44] The accused argued that in passing the sentence, the learned trial judge had failed to consider the following factors: A

a. The age of the accused who was 42 years old at the material time;

b. The accused's record of service prior the offence; B

c. The wife (a homemaker) and four children of schooling age are dependent on him for financial support.

d. The accused's clean antecedents. C

e. The hardship suffered by the accused during the seven years waiting for the trial for this case as he had to travel back and forth from Kedah to Kota Kinabalu and Ranau.

[45] It was the prosecution's contention that the learned trial judge D had erred in law by not following the provision under s. 16 of the Act which provides for punishment in imprisonment and fine. The sentence of one month imprisonment for each count and both sentences to run concurrently is too lenient considering that the accused was convicted of soliciting and accepting bribe. It was E submitted that the learned trial judge had failed to take into account the public interest in passing sentence.

[46] In sentencing, the learned trial judge decided to be lenient largely because through no fault on the part of the accused, he had F to endure a much longer period than was necessary before the trial was finally concluded on 14 October 2004 after it commenced on 11 May 2000. Between the postponements the accused had to travel between Ranau, Sabah and Kedah where he lived. And he never failed to attend court without valid reasons. Learned trial judge was G aware that these were no mitigating factors but somehow he considered that it would be unfair to impose a heavier punishment upon him.

[47] I agree with the prosecution that the learned trial judge had H failed to take into account public interest when sentencing. Although the accused had been greatly inconvenienced by the numerous adjournments of hearing through no fault on his part, the factor can never out weight the interest of the public especially when the offence committed is that of corruption by a policeman. I

A **[48]** The primary duty of the police is to maintain law and order and it is a serious matter when policemen abuse their positions and prey on helpless and vulnerable public. Undeterred corrupt practice among the police will not only undermine its esteem in the eyes of the public, but will in most cases also lead to social unrest with
B the breakdown in the enforcement of law and order.

[49] Thus, sentence of one month imprisonment without fine is unjustifiably lenient and cannot be upheld. Accordingly, I set aside the sentence imposed by the lower court and substitute it with a
C fine of RM10,000 in default three months imprisonment and an imprisonment term of six months on each count, to run concurrently.

The appeal by the accused against sentence is accordingly dismissed.

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